89-1321

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

PAUL BORN III,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where specific intent is an element of the crime charged,

And where, in response to defense pretrial inquiry, the prosecution formally states that it will not introduce evidence of other acts pursuant to F. R. Evid. 402(b) as a part of its case in chief, thereby apparently making it unnecessary for the defendant to prepare to meet such evidence,

And where, after the prosecution rests, the defendant testifies and denies all participation in the crime charged,

May the prosecution introduce evidence of other acts during rebuttal, on the theory that the denial of involvement carries with it an implied denial of intent which must be rebutted by evidence of other specific acts?

Or does that tactic constitute trial by ambush?

2. May a prosecutor cross examine a defendant by suggesting that the defendant made incriminating statements to another person; elicit the defendant's denial that such statements were made by him; and then fail to prove, or even to attempt to prove those alleged statements?

3. Where a former co-defendant who has pled guilty, and who has negotiated an agreed sentence with the prosecution, possesses evidence not otherwise available to the defendant concerning relatively uncontroverted exculpatory facts,

And where the defense seeks to call that person as a witness,

And where that witness' willingness to testify is conditioned upon an

assurance that he will not be examined concerning unrelated offenses which might affect his negotiated plea,

And where no legitimate governmental interest is served by a refusal so to limit the examination,

May the government dissuade that witness from testifying by threatening the broadest possible cross examination?

4. Where a criminal defendant admits having been present in the vicinity of a crime but denies all participation and, although lacking personal knowledge, suggests that the crime probably was committed by others who were present,

May the accused introduce evidence concerning the habits and associations of those other persons in order to show the likelihood of their guilt?

And may he show that he is not an

associate of those persons, in order to diminish the likelihood of his own guilt?

LIST OF PARTIES IN THE COURT OF APPEALS

The United States of America, as Plaintiff-Appellee.

Petitioner Paul Born III and Co-Defendant Donald Mazzanti, as Defendants-Appellees.

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REFERENCE TO REPORTS

The opinion of the Court of Appeals is reported at 888 F. 2d 1165. The opinion also appears as Appendix "A" to this Petition.

No opinion was delivered by the District Court.

GROUNDS FOR INVOCATION OF JURISDICTION

(i) The judgment of the Court of Appeals was entered on November 1, 1989.

(ii) A timely petition for rehearing was filed by this Petitioner, and an order denying that petition was entered on December 11, 1989. No extension of time within which to petition for certiorari has been requested or granted.

(iii) No cross petition has been filed.

(iv) Jurisdiction to review the judgment by writ of certiorari is

conferred on this Court by Title 28 United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V to the Constitution of the United States provides, in relevant part:

> No person shall be . . . deprived of life, liberty or property without due process of law. . .

Federal Rule of Evidence 404(b) provides as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

CONCISE STATEMENT OF THE CASE

Petitioner was one of six people indicted on charges of conspiracy and

substantive violations of narcotics laws. Four of the indictees ultimately pleaded guilty. Petitioner and one co-defendant, Donald Mazzanti, were tried together, and each was convicted of conspiracy and four substantive violations. Petitioner was sentenced to a twenty-three year term of imprisonment together with other penalties. (Mazzanti also was convicted, and his conviction was affirmed by the Court of Appeals. He is not involved in this Petition.)

Evidence for the Prosecution

According to the government's evidence, the key actors in the alleged cocaine sales, in addition to Petitioner and Mazzanti, were co-indictees Oscar DeLisle and Daniel Taglia, who entered pleas of guilty; informer Robert Blessing; and an undercover DEA agent, John Riley.

On three occasions, DeLisle sold cocaine to Riley (Tr 463-65; 471-73; 479), to whom he had been introduced by Blessing (Tr 458). On three other occasions, Riley purchased cocaine from Taglia (Tr 374, 384, 164). Government witnesses testified that Petitioner and Mazzanti were involved in the DeLisle sales, and that different defendants participated in the first two sales by Taglia (Tr 374, 384.) All defendants, however, were claimed to have participated in the final sale, which involved a much larger quantity of cocaine than did the others.

Two van-type vehicles were used at different times to deliver the cocaine. One of those vehicles was owned by John Burroughs (Tr 1275), who was neither a party nor a witness. The other was owned by Petitioner (Tr 1418). Petitioner was

identified as the delivery driver on three occasions (Tr 150, 192, 668), and his van was present near the scene of another sale (Tr 956). Witnesses also identified Mazzanti as having been present during or prior to many of the transactions.

[A detailed account of the evidence as viewed most favorably to the government is set forth in the Court of Appeals opinion, Appendix A. Petitioner concedes that the government introduced evidence which, if believed, would have justified a rational jury in returning a verdict of guilty. He contends, however, that the issue was a close one, and that the errors assigned in this Petition cannot reasonably be regarded as harmless.]

Petitioner's Evidence and Theory

Petitioner specifically denied participation in each of the sales (Tr

1382, 1383). He was a frequent patron of the ABC Lounge, at which most of the sales were consummated (Tr 1447, 1494), and testified that he could not recall whether he had been there on the specific dates of the cocaine transactions (Tr 1495). He was arrested at a bar across the highway from the scene of the final sale (Tr 830). He unequivocally denied, however, all guilty knowledge and participation in the offenses.

It was Petitioner's theory that the cocaine deals were made by members of a motorcycle gang which also frequented the ABC Lounge (Tr 1338, 1397). He was not a member of that group (Tr 1389).

Three members of that motorcycle gang were co-defendant Mazzanti, John Burroughs and John Newell (who, like Burroughs, was neither a party nor a witness [Tr 1183,

1390-94]). Petitioner, Burroughs and Newell all were large, bearded men (Tr 1447). Petitioner was strikingly similar to Newell in appearance (Tr 1448), and resembled Burroughs in general physical characteristics (Tr 594).

All of Petitioner's tendered evidence concerning the motorcycle gang, and indeed all evidence mentioning motorcycles in any context, was excluded by the trial judge, Tr 1400.

It was further Petitioner's theory that his initial erroneous identification as the driver of the van had resulted from his being confused with Burroughs, and that thereafter the error had been compounded by the assumption that the same person had acted as driver for all other deliveries (Tr 1206).

Petitioner testified that he had only a legitimate business relationship with Mazzanti, Taglia and DeLisle (Tr 1383-1389). Petitioner was self-employed in the maintenance of his family's apartment buildings and rehabilitation of other properties (Tr 1379). For that purpose he employed Mazzanti as a carpenter (Tr 1385), and contracted with a sheet metal shop operated by Taglia and DeLisle (Tr 1387) for installation of heating ducts and similar operations (Tr 1386).

STATE COURT PROCEEDINGS

No state court proceedings of any nature are involved in this case.

BASIS OF FEDERAL JURISDICTION

This case involves the prosecution of a federal crime, based on an indictment returned by a federal grand jury. The

jurisdiction of the District Court rested on Title 18 U. S. Code, Section 3231.

REASONS FOR ALLOWANCE OF WRIT

1.
Abuse of "Other Acts" Evidence

A. The Conflict Between Circuits

On their face, the Federal Rules of Evidence purport normally to forbid the use of "other acts" evidence. Exceptions are provided only to the extent necessary to avoid foreclosure of essential issues. F. R. Evid. 404(b), 405(b), 608(b).

That tenderness reflects the concern, shared by this Court, "that unduly prejudicial evidence might be introduced under Rule 404(b)." Huddleston v. United States, _____ U.S. _____, 108 S. Ct. 1496, 1502 (1988), citing Michelson v. United States, 335 U.S. 469, 475-476 (1948).

This case presents the question whether "other acts" evidence may be introduced as rebuttal whenever a criminal defendant denies participation in the charged offense.

In the Seventh Circuit, the answer is yes, as shown by the opinion in the case at bench and by United States v. Chaimson, 760 F. 2d 798, 806 (7 Cir 1985), cited in that opinion (Appendix A, page 9). The rationale is that a defendant's denial of participation in an offense necessarily carries with it a denial of an intent to commit the crime. In the Seventh Circuit view, the prosecution may therefore use "other acts" evidence to rebut that implied denial.

The Seventh Circuit goes further, admitting "other acts" evidence in support of all prosecutions for offenses requiring

proof of specific intent. United States v. Manganellis , 864 F. 2d 528, 532, 534 (7 Cir 1988).

The opposite view is taken by the Second Circuit in United States v. Colon, 880 F. 2d 650, 658-60 (2 Cir 1989); United States v. Ortiz, 857 F. 2d 900, 904 (2 Cir 1988); and cases there cited. In the Second Circuit view, the issue of intent is not raised by "a defense that he did not do the charged act at all." (Colon, at 659; Ortiz at 904.)

The Second Circuit admits such evidence if the defendant claims non-involvement while admitting being present in a car in which the transaction took place, or accompanying the seller to the site of the sale. Colon at 660. Short of that, however, denial of involvement is not viewed as the type of denial of intent

which will furnish the pretext for "other acts" evidence.

We urge that the Second Circuit view is the only one which is consistent with basic fairness and with an awareness of the potential for deliberate misuse of the "other acts" doctrine. By its decision in James v. Illinois, _____ U.S. _____, 58 USLW 4115 (1990), this Court took note of the chilling effect of unwarranted impeachment on the right to present a defense. The spectre of unanticipated and unforeseeable "other acts" is at least as daunting to the defendant who would deny is guilt, as is the possibility of the introduction of suppressed evidence which Your Honors considered in James.

B. Trial by Ambush

By pretrial motion, Petitioner sought information whether the prosecution

planned to use "other acts" evidence. Such advance information, of course, is essential to proper preparation of a defense. The defense must be prepared to refute at trial not only any erroneous evidence directly supporting the indictment, but as well any erroneous claim of a prior wrongful incident.

The prosecution disclaimed all intention to use such evidence. Granted, that disclaimer was limited to its case in chief, as necessarily is true of any such disclaimer (Tr 1491). Facially, however, the prosecution's disavowal was an assurance that Petitioner need not prepare to meet such evidence except in the unlikely event that he might volunteer a false denial of some specific prior misconduct.

Petitioner testified and denied all involvment in the charged transactions. Thereupon, the prosecutor cross examined him as to whether he knew what a "Z" is in argot of cocaine traffickers. Petitioner admitted that he had heard the term "OZ" used to denote an ounce of cocaine, but denied that he had heard the letter "Z" used for that purpose.

It would have been an offense against basic fairness if the prosecutor had been content to try to persuade the jury that Petitioner's familiarity with the term "OZ" was reason to believe him a trafficker. The prosecutor, however, was not satisfied to inflict less than a killing blow.

With a flourish, the prosecutor produced a policeman, one Mueller, who testified that he had negotiated with

Petitioner for the sale of cocaine, and had used the word "Z" in that negotiation. (Tr 1573-74)

The claimed significance of that testimony lay entirely in Mueller's claimed ability to recall that a year earlier, he had referred to "Z" rather than "OZ". That claimed significance is about as thin as can be conceived.

The record fairly shouts that the prosecution literally ambushed Petitioner through an intolerably opportunistic tactic. Led to believe that there was no need to investigate or prepare to rebut evidence of that type, Petitioner was confronted with exactly the type of evidence which he had been led to ignore during his trial preparation.

Quite obviously, any prosecutor to whom victory is the primary consideration

would much prefer to use "other acts" evidence in rebuttal than in the case in chief. That tactic not only offers the last word, but prevents the defendant from investigating and preparing to refute that evidence.

And that is exactly what happened here.

The procedure approved by the opinion below is a deadly blow against the basic concept of a fair trial.

Petitioner was neatly placed between Scylla and Charybdis, with the whirlpool disguised as a placid pond. He could mount no defense, and inevitably be convicted; or he could deny his guilt, and be assaulted with unanticipated, vague and equivocal suggestions of generalized criminality.

C. The Abuse of Huddleston

(1) Misapplication of the Evidence

In the instant case, the prosecution treated Huddleston as license for deliberate misuse of any "other acts" as to which prima facie evidence can be presented. (And see App. 11, fn. 5.)

Prosecutorial reliance on Huddleston seems misplaced in this case. The prosecution claims that it did not use "other acts" evidence to prove an element of the crime charged, but only to rebut Petitioner's claim that he did not commit the crime charged against him. Any different claim, of course, would belie the proposition that the prosecution "lived up to its agreement" (App. A, p. 9)

The case stands as a monument, however, to the evanescence of the protective devices cited in Huddleston.

The four sources of protection against unfairness upon which this Court relied in Huddleston (108 S. Ct. at 1502) were ineffective in the case at bench. Ineffective, because the prosecution embarked on an exploitive campaign designed to ignore or circumvent those protections, and succeeded in that effort.

The Court of Appeals notes that the jury was instructed [just as Huddleston requires (108 S. Ct. at 1502)] "that the evidence should be considered only as to [Petitioner's] intent and knowledge." The court below views that instruction as satisfying two of the four Huddleston safeguards: "Because the defendant has presented no evidence to convince us otherwise, we make the crucial and valid assumption that the jurors carefully follow instructions given to them by the

court." (App. A, p. 11).

But what conceivable evidence can any litigant offer concerning the thought process of the jury? The Court of Appeals rationale stands for the proposition that the instruction is conclusive evidence that the jury did not misuse the evidence.

Clearly, however, it was misused by the prosecutor, who was permitted to argue that the jury should treat Detective Mueller's "Z" story as proof that Petitioner is a liar (Tr 1664). To claim, in the face of that deflection, that the jury treated Mueller's story as nothing more than proof of intent, is to close one's eyes to the obvious.

(2) Invention of Evidence

Prosecutorial "proof" of other acts exploited the nonexistent as well as the irrelevant. The prosecutor invented a

conversation and then used it as the predicate for a "rebuttal" which in fact was nothing more than an evasion of the rule forbidding evidence of irrelevant (as well as imaginary) past conduct.

The prosecutor asked Born whether he had had a conversation with convicted narcotics trafficker DeLisle on May 13 in which Born had referred to "two Z's of coke". Born denied that any such thing had happened (Tr 1498).

Such a comment by Born to DeLisle would, of course, have been very strong proof that Born had been a party to DeLisle's criminal acts, and would have refuted Born's testimony that he had been unaware of the cocaine sale made by DeLisle on that day. The prosecutor's tactic, however, was indecent rather than probative: There is no suggestion in the

record, apart from the prosecutor's question to Born, that any such conversation ever occurred!

Petitioner's complaints against that tactic have not been merely rebuffed, but ignored. The prosecution made no reference to the issue in its Brief in the Court of Appeals. That court, in turn, finds that it "need not address this contention since we have determined that Detective Mueller's testimony was admissible." (App. A, pp. 10-11, fn. 4) The court below can only have completely misapprehended the issue. It was the supposed DeLisle conversation, not the Mueller testimony, which was imaginary. And surely, it cannot be suggested that the availability of evidence concerning one incriminating conversation excuses the false claim of a completely different

event. It is quite readily possible that a jury prepared to discount Mueller's claim of ability to recall that "Z" rather than "OZ was mentioned a year earlier (he had made no record of the conversation, Tr 1576), would have been strongly impressed by the prosecutor's flat assertion that Petitioner had said the same thing to DeLisle on a different occasion.

Surely, it is possible to use 404(b) evidence with probity and restraint, as Huddleston holds. No such qualities are demonstrated, however, by this record.

2.
Exclusion of Defense Evidence

Few would question a defendant's right to testify and deny his guilt. Nix v. Whiteside, 475 U.S. 157, 164 (1986). That right, however, is of little value if, as happened here, the defendant is

prohibited from attempting to show that a different person is responsible for the crime. In the real world, as opposed to legal theory, a criminal defendant's testimony is viewed with suspicion simply because he is the defendant.

That attitude, while at odds with Constitutional doctrine, is not entirely illogical: It cannot be doubted that a criminal defendant has the most obvious bias, and the most vital stake in the outcome of the case, that any witness possibly could have. A defendant's unsupported denial, especially when measured against contrary testimony by federal agents, is unlikely to be viewed as persuasive. There is little chance for acquittal in such circumstances unless the defendant is able to support his denial with extrinsic exculpatory material.

That basic right was denied in this case. The opinion below carries the seeds of many future denials of that type.

A. Exclusion of Evidence Suggesting That Others Committed the Crime

It was Petitioner's theory, from his opening statement (Tr 66 et seq.) to the time of total preclusion (Tr 1400), that if any cocaine sales had occurred ---and he had no way of knowing that except as advised after his arrest---he was not a participant in any of those sales.

It was further his theory that any such sales had been the work of "The Brothers", a motorcycle gang which frequented the ABC Lounge (Tr 1388), and that any identification of him as a participant was due to his being confused with one of two members of that gang, both of whom resembled him (Tr 1397-98; 1740-

41).

The ABC Lounge was the scene of many of the incriminating events described by the prosecution's evidence. Petitioner was a regular patron of that Lounge (Tr 1386). He sought to testify that "The Brothers" also frequented the ABC (Tr 1338); that Petitioner was not a member of that gang (Tr 1394), and did not even own a motorcycle (Tr 1451); and that among the gang members were:

> ---Co-Defendant Mazzanti (Tr 1392);
>
> ---John Burroughs, the owner of one of the two vans which the government proved to have been used to deliver cocaine, and who generally resembled Petitioner in physical appearance (Tr 594, 1447);
>
> ---John Newell, president of The Brothers, a person strikingly similar in appearance to Petitioner, for whom Petitioner had been mistaken on several occasions by patrons of the ABC Lounge (Tr 1447-48).

All that evidence was excluded, and a total order of preclusion was entered forbidding all references to any motorcycle activity (Tr 1400). Petitioner also was forbidden to ask supervising "case agent" Sherod Jones, called by Petitioner as an adverse defense witness, whether Jones had learned that a motorcycle gang had been involved in the cocaine transactions, whether he ever had reported that proposition to anyone else (Tr 1262, 1263), and whether he had told the grand jury that Mazzanti was a biker (Tr 1263).

That relevance of that line of evidence borders on incandescence.

Newell's presidential office in The Brothers was a matter of major significance. At the scene of the final (and largest) sale, Newell was present in

a capacity which can only be described as "riding shotgun." He was armed with both a pistol and a rifle, and resisted arrest (Tr 506).

It was clearly shown that a van belonging to Burroughs had been used to deliver some of the cocaine (Tr 150, 192); that Burroughs generally resembled Petitioner; and that one agent's testimony had confused that van with Petitioner's (Tr 1154, 1181). It also was established that John Newell was arrested while guarding the final cocaine delivery with a rifle and a pistol, and that co-Defendant Mazzanti had been involved in the sales. In light of those facts, the further tendered facts that "The Brothers" were a closely knit and distinctively uniformed motorcycle gang that frequented the lounge in question (Tr 1393, 1407); that Mazzanti

and Burroughs were members of The Brothers (Tr 1392); that John Newell, who strikingly resembled Petitioner, was president of The Brothers; that Petitioner was not a member of The Brothers (Tr 1389); that Petitioner was not a motorcyclist (Tr 1394, 1400, 1451); and that Case Agent Jones had found and reported that a motorcycle group was involved in the investigation (Tr 1262-63)---all these were highly relevant facts. Those facts are capable of causing rational jurors to doubt that Petitioner was associated with the motorcyclists who were shown to be closely bonded to each other and involved in the cocaine sales charged in this case. Rational jurors might well have drawn strong exculpatory inferences from those facts.

To have denied Petitioner the benefit of those inferences, was grave error, effectively thwarting his effort to present a legitimate defense case and argument. United States v. Pizarro, 717 F 2d 336, 351 (7 Cir 1983).

The relevance of the excluded facts is obvious. Petitioner denied that he ever had driven or even been inside Burroughs' van (Tr 1412), contrary to the testimony of two prosecution witnesses. To support that denial, he sought to argue that Burroughs was a likely offender; that Burroughs and Newell, who resembled him, were logical operators of Burroughs' van and reasonably might be mistaken for him; and that it was improbable that he, as a non-member of that gang and non-motorcyclist outsider, would be asked or even permitted to take charge of its

cocaine or drive a gang member's vehicle for that purpose (Tr 1397-98).

The trial court accepted the prosecutor's argument that it "does not follow" that Petitioner "could not be or is not a participant because he is not a member of the motorcycle club" (Tr 1399).

The Court of Appeals, in turn, approved exclusion of the evidence because Petitioner, lacking first hand knowledge, did not testify that the motorcycle gang was engaged in drug selling, nor did he offer "the testimony of any motorcycle gang members to that effect." (App. A, pp. 6-7).

The Court of Appeals is mistaken. Petitioner, aided inadvertently by the prosecution, proved that Newell, the president of the gang, served as the armed guard at the final and largest drug sale

(Tr 506, 1447). With the same unintended assistance, he proved that DEA Agent Jones, the supervising agent in the investigation, had found and reported that a motorcycle gang was involved in the operation (Tr 1262-63).

True, the gang's participation in the drug sales does not prove that Petitioner, a non-member, could not have taken part. A defendant, however, is not limited to producing evidence which unequivocally negates guilt. He has an equal right to present evidence which may create an exculpatory inference. That proposition recently was reaffirmed by this Court in Skinner v. Railway Labor Executives Association (1989), _____ U.S. _____, 109 S. Ct. 1402, 1421:

> As we emphasized in New Jersey v. T.L.O., [469 U.S. 325, 345 (1985)], "it is universally recognized that evidence, to be relevant to an inquiry, need not

> conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination [of the point in issue] more probable or less probable than it would be without the evidence.' "

Petitioner did not claim at trial or on appeal, and does not claim now that the excluded evidence would have been sufficient to mandate a directed verdict of acquittal. Beyond question, however, that evidence would have rendered his guilt less likely. No proper purpose was served by denying him the right to present that evidence and to argue the logical inferences to be drawn therefrom.

The rejected testimony was relevant, and clearly did not lack a rational base. The jury, however, were repeatedly informed by the trial judge that Born's references to the motorcycle gang were

irrelevant and should not be considered by them. The jury could not have reached any conclusion other than that Born's theory of the case was totally without merit.

B. Intimidation of a Defense Witness

A related event occurred when Petitioner attempted to call Daniel Taglia as a defense witness. Taglia, a deeply-involved cocaine trafficker who previously had pleaded guilty in this case pursuant to an agreement with the prosecution (Tr 30, 45), was sought to be examined on behalf of Petitioner to refute certain testimony by informer Blessing, and on other nonincriminating matters (Tr 1085-86). Taglia's counsel was present at the time. In response to Petitioner's counsel's assurance that incriminating questions would not be asked, the

prosecutor volunteered a warning that if Taglia were to testify, he would not observe any limitation but would "explore this witness's credibility as fully as the law allows, and we think that that would obviously involve [other] areas" (Tr 1086). Thus threatened, Taglia , who was concerned about the possible impact of his testimony upon his pending plea agreement (Tr 1098), declined to testify on grounds of self-incrimination (Tr 1100-1103).

Examined outside the presence of the jury, however, he answered a few of the questions by Petitioner's lawyer. He stated that all his transactions with Blessing "were legal ones" (Tr 1100). In another contradiction of prosecution testimony, although quite possibly without realizing the significance of the fact, he said that no telephone beeper had been

taken from him at the time of his arrest (Tr 1106). [Supervising Agent Jones had testified that other agents had told him that a telephone beeper, introduced as an exhibit, had been taken from Taglia (Tr 1136). Jones admitted that although the name of the beeper service and a telephone number appeared on the beeper, no effort had been made to determine the identity of the subscriber (Tr 1137-39).]

Taglia offered to testify fully if the prosecutor would agree, as had Petitioner's counsel, that his testimony would not be regarded "as having opened any door to further inquiry." Asked whether he would agree, the prosecutor answered "Absolutely not." (Tr 1104).

Guided by counsel, Taglia then claimed his privilege against self-incrimination to all questions other than

the one concerning the beeper (Tr 1104-1109), although it is difficult to imagine that many of those questions could have harmed him. Petitioner sought to call Taglia before the jury with respect to the question that he had answered concerning the beeper. Taglia then stated that if examined in front of the jury, he would claim self-incrimination privilege as to that question as well (Tr 1108-10).

The jury returned, and Taglia was asked about the beeper (Tr 1114). He declined to answer on Fifth Amendment grounds. He then was asked whether, ten minutes earlier, he had testified that no beeper had been seized from him. He claimed self-incrimination as to that question as well (Tr 1115). Petitioner's counsel argued that self-incrimination was not available as to the latter question,

but the prosecutor disagreed, and the court refused to compel an answer (Tr 1115).

The jury were then excused, and Petitioner was denied the right to prove Taglia's earlier statement as former testimony. That result was reached by bringing Taglia back on voir dire to claim self-incrimination with regard to the prosecutor's questions (Tr 1120), so that the former testimony was deemed excludable on grounds of lack of opportunity for cross examination (Tr 1121).

The prosecutor's inability to cross examine, however, was a self-inflicted wound. He had elected not to cross examine when the testimony was given on voir dire, at a time when Taglia was testifying freely. Moreover, as Taglia and his counsel made clear, it was

necessary only for the prosecutor to agree that he would not explore other areas, and he would have been free to ask any question that he might wish on that issue.

The law seems clear that a prosecutor has discretion with respect to grants of immunity, and obviously he has discretion concerning the scope of any cross examination that he might conduct. We would think it salutary, however, if Your Honors were to declare that those rights may not be exercised in a manner which deliberately chills the defense effort to prove facts. Taglia was clearly vulnerable to fearful prosecution retaliation during that period between his guilty plea and his sentencing. The prosecutor therefore was in total control of the availability of Taglia's testimony. There was no chance that Taglia could

acquire immunity or otherwise escape justice through any restriction that might be placed on his cross examination, for Taglia already had pleaded guilty and obviously was concerned that the plea agreement not be abrogated.

And so in this aspect as well, Petitioner was denied the right to introduce exculpatory testimony. The technical forms of law were observed, but serious injustice resulted. We pray that this Court will direct that such forms hereafter give way to substance, and that the prosecution may not use its power as a vehicle for arbitrary denial of the right to present a defense.

3.

<u>The Errors Were Not Harmless</u>

It is quite true that several federal agents, in addition to an informer, identified Appellant Petitioner as a

participant in four sales of cocaine. In some cases, that testimony might justify the treatment of many forms of error as harmless.

It also is true, however, that Petitioner testified unequivocally that he had done no such thing. Thus, there was an issue to be decided by the jury. The evidence of guilt can be regarded as conclusive, only if Petitioner's testimony is ignored. United States v. Vargas, 583 F 2d 380, 387 (7 Cir 1978).

The agent testimony cannot reasonably be termed "overwhelming", and cannot exclude reasonable doubt.

In one sense, prosecution evidence always is overwhelming if the defense evidence is excluded, or improperly impugned (or, as here, both). That "principle" is tested sorely, however, by

the circumstanes of this case.

During earlier testimony before a magistrate, for example, Supervising Agent Jones had confused Petitioner's van with the Burroughs van, and had erroneously testified that both vans were registered to Petitioner (Tr 1154, 1157). He claimed that as soon as he got off the stand, he realized his error and advised the prosecutor, but neither said anything to the magistrate about it (Tr 1160-61).

Although the agents had seen John Burroughs' van being used to deliver cocaine, they did not even bother to interview him until after the trial had commenced (Tr 1365). When finally interviewed, Burroughs, who was 29 years of age, persuaded the agent that he was his own father, age 52; that he could not have been involved in the cocaine sales

because he had been in Florida; and that a Florida traffic ticket issued to his father, a truck driver, "proved" that Burroughs could not have been involved in an Illinois transaction at the time (Tr 1283-89; 1365-73). That "evidence" convinced the interviewing agent of Burroughs' innocence.

A gun had been found in Petitioner's van the day after his arrest (Tr 832). The agents had permitted the van to stand unattended for some fifteen hours (Tr 874). Petitioner disclaimed all knowledge of the gun (Tr 1520). Jones admitted that no effort had been made to trace that weapon by its serial number (Tr 1141-42).

Jones also conceded that a report submitted by Agent-witness Hacias contained a material error (Tr 1142-43).

In that posture, it is impossible to regard as harmless any factor which prevented Petitioner from buttressing his testimony. The exclusion of Petitioner's proffered evidence made his case "far less persuasive than it might have been", Chambers v. Mississippi, 410 U.S. 284, 294 (1973), and for that reason it is impossible to treat the jury's finding of fact as conclusive. United States v. Pizarro, 717 F 2d 336, 351 (7 Cir 1983).

To disregard the impassable barrier placed athwart Petitioner's effort to defend himself, would be to treat the Fifth and Sixth Amendments minor technicalities.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 88-2287 & 88-2361

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONALD MAZZANTI and PAUL BORN III,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 518—**James F. Holderman**, *Judge.*

ARGUED FEBRUARY 21, 1989—DECIDED NOVEMBER 1, 1989

Before WOOD, JR., COFFEY, and KANNE, *Circuit Judges.*

COFFEY, *Circuit Judge.* Donald Mazzanti and Paul Born III appeal their convictions on charges of conspiracy to possess with intent to distribute and to distribute cocaine in violation of 21 U.S.C. § 846, and of possession of cocaine with intent to distribute and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). We affirm.

I. FACTUAL BACKGROUND

On February 24, 1987, Robert Blessing, while the subject of an arrest warrant issued in DuPage County, Illinois, on state charges for distribution of cocaine and other

charges, turned himself in to the United States Drug Enforcement Administration ("DEA") authorities in Chicago, Illinois.[1] Blessing informed the DEA agents that he had purchased cocaine from Dan Taglia, Oscar DeLisle, and another person in the DuPage County area and agreed to cooperate and assist the DEA agents in investigating these persons.[2]

In compliance with the agreement to cooperate, Blessing contacted DeLisle in March 1987, and arranged for a cocaine buy on April 2, 1987, at the ABC Lounge in Streamwood, Illinois. On the given date, Blessing and undercover DEA Agent John Riley met DeLisle, Mazzanti and Born in the lounge. Mazzanti, DeLisle and Born conversed, and then DeLisle directed Blessing and Agent Riley to a storeroom in the lounge and handed Riley a plastic bag containing approximately two ounces of cocaine. Agent Riley gave DeLisle $3,200.

Blessing and DeLisle scheduled another cocaine deal eleven days thereafter. On April 13, DEA Agent Riley and Blessing met Mazzanti, Born and DeLisle in the parking lot of the ABC Lounge, and DeLisle informed Blessing and Agent Riley that the cocaine had to be picked up in Elgin, Illinois, and instructed them to wait in the parking lot. Later that same day, DeLisle and Born returned, and DeLisle gave Agent Riley a clear plastic bag containing approximately two ounces of cocaine in exchange for $3,200.

Blessing arranged for a third cocaine buy the following month. On May 13, Agent Riley and Blessing met DeLisle and Mazzanti at DeLisle's home, and shortly thereafter, DeLisle left to get the cocaine. Meanwhile DEA surveillance Agent Christopher Hacias observed DeLisle enter the ABC Lounge while Paul Born was observed arriving in his maroon van. Born entered the bar, and DeLisle

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[1] The state charges are not before this court.

[2] In return for his cooperation the DEA agents stated that they would inform the state's attorney of Blessing's assistance.

departed, walking to Born's van where he removed a dark colored package. DeLisle next returned to his home and sold Agent Riley approximately two ounces of cocaine.

On July 13, 1987, Blessing and Taglia consummated another drug transaction. Blessing, undercover Agent Riley, and a second undercover agent, Bill Maloney, met Taglia at his residence. Taglia agreed to supply $175,000 worth of cocaine for the price of $32,000 per kilogram.

Later that day, Taglia, Agent Maloney, Agent Riley and Blessing drove to Nancy's Pizzeria in Streamwood, Illinois, where they met with Mazzanti and Oscar DeLisle. During the conversation, DeLisle commented that if there was any trouble there would be a lot of "dead cops," while Taglia stated that the "DEA" agents would meet the same fate. Mazzanti and Agent Riley discussed the quality of the cocaine to be exchanged. At one point, Mazzanti left the table to make a phone call and later explained that he was trying to reach "my guy Paul."

A short time later, Paul Born arrived in the parking lot in his maroon van. At that time, Mazzanti asked Blessing for the keys to his car in order that Mazzanti might move the car and put the cocaine into the trunk. Surveillance Agent Hacias observed Born remove a large white plastic pail from the van and next observed Mazzanti transfer the pail into the trunk of Blessing's car. Mazzanti returned to the restaurant and returned the keys to Blessing. Thereafter, Blessing went outside, tasted the cocaine, and informed Riley and Maloney that the cocaine was suitable. Agent Riley and Taglia went to the parking lot to exchange the money, and DEA agents arrested all of the defendants. The DEA agents, in searching Blessing's car after the arrests, came upon the white pail containing approximately twelve pounds of cocaine. DEA agents also searched Born's van and found a telephone paging device, a .357 magnum pistol, and three bags containing cocaine.

The defendants were each charged with one count of conspiracy to possess with intent to distribute and to dis-

tribute cocaine, in violation of 21 U.S.C. § 846; and four counts of possession of cocaine with intent to distribute and distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1).

When the jury trial commenced, Born's counsel, in his opening statement, argued that Born was not involved in any of the drug deals but was mistaken for one of two other men who resembled him and frequented the ABC Lounge. Born's counsel also argued that the cocaine deals were the product of a motorcycle gang called the Brothers and that Mazzanti was a member of the gang, but Born was not. At trial, Born attempted to place the responsibility for the cocaine transactions on the motorcycle gang. The trial court ruled that the testimony was irrelevant and inadmissible. After Born's counsel had made reference to a motorcycle gang, Mazzanti moved for a severance, arguing that the comments of Born's counsel were evidence of the defendants' mutually antagonistic defenses. The district court, upon consideration of the motion, denied the same.

Born in his testimony explained that he owned a maroon van and that DeLisle and Mazzanti kept their work tools in his van. Born further stated that he was at or near the locations of the cocaine sales on at least two of the dates charged but denied involvement in the cocaine transactions or the drug conspiracy. The government cross-examined Born as to whether he discussed the cocaine purchases with DeLisle and also inquired whether he used the term "two Z's" of cocaine in a discussion with DeLisle. Born denied making any statement or having had any discussion regarding "two Z's." The government then inquired whether Born knew the meaning of the term "two Z's" of cocaine—he denied any knowledge of the term. In rebuttal, the government, over Born's objection, introduced the testimony of Detective John Mueller, an Illinois police officer, who testified that he had a conversation with Born in which they discussed the purchase of cocaine and that when the detective used the term "Z's" of cocaine in reference to ounces of cocaine, Born appeared to understand the meaning of the term.

At the close of the evidence, Mazzanti proferred a multiple conspiracy instruction, but the district court rejected the instruction, finding that there was no evidence of a multiple conspiracy.

On April 29, 1987, the jury found Mazzanti and Born guilty of the cocaine-related charges.[3] Mazzanti was sentenced to a twelve-year prison term and five years of supervised release. Born was sentenced to a twenty-three year prison term and ten years of supervised release.

Born on appeal alleges that: (1) the district court erred in excluding evidence regarding the alleged motorcycle gang and Born's denial of his membership in it; (2) the district court committed reversible error in admitting Detective Mueller's testimony regarding Born's knowledge of drug transactions. Mazzanti alleges on appeal that the district court erred in denying Mazzanti's motion for severance. Also, both Mazzanti and Born allege that the trial court erred in failing to give the jury a multiple conspiracy instruction.

II. EXCLUSION OF EVIDENCE

Born contends that the district court erred in refusing to allow him to testify that a motorcycle gang was involved in the drug conspiracy. Born, even though never a member of the motorcycle gang and thus without any personal knowledge of the gang's self-enforced rules, argues that evidence concerning the other defendants' motorcycle gang membership was relevant to his defense since motorcycle gang members do not include non-members in their drug transactions. Born further contends that the evidence would have assisted him in his mistaken identity defense as he alleged that two motorcycle gang members resembled him. Because Born contends that this evidence was relevant for these two separate reasons, we shall discuss each relevancy contention individually.

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[3] Born was charged but acquitted of possession of handgun during and in relation to a felony.

Born "carries a heavy burden on appeal because an evidentiary ruling will be reversed only if a trial court committed '*a clear abuse of discretion.*' " *Jones v. Hamelman*, 869 F.2d 1023, 1027 (7th Cir. 1989) (quoting *Bohannon v. Pegelow*, 652 F.2d 729, 732 (7th Cir. 1981)) (emphasis added in *Jones*). As we stated in *United States v. Kaden*, 819 F.2d 813, 818 (7th Cir. 1987), "a . . . reviewing court gives special deference to the evidentiary rulings of the trial court."

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Fed. R. Evid. 401." *United States v. Amaro*, 816 F.2d 284, 286 (7th Cir.), *cert. denied*, 481 U.S. 1031 (1987).

Born's initial contention is that the evidence concerning motorcycle gang membership was relevant to his defense because even though it might conceivably be possible for non-gang members to be involved in the cocaine transactions, it was more likely than not that a motorcycle gang would not allow non-members to participate in its drug deals. The district court noted that Born was not competent to testify to the machinations of the gang as he lacked personal knowledge of these matters since he was not a member of the group. Further, Born failed to offer the testimony of any motorcycle gang members concerning the operations of the motorcyclists nor did he proffer any evidence concerning the motorcycle gang's drug selling practices that would support his defense that he was not a participant in the alleged cocaine transactions.

As to the use of the motorcycle gang evidence to support Born's mistaken identity defense, we note initially that Born was allowed to introduce evidence on this defense. He was prevented only from bolstering this argument with other extraneous evidence concerning the motorcycle gang which the trial court excluded on grounds of relevance. Further, as discussed earlier, on the drug sales issue, the court reasoned that Born was not competent to testify as to the machinations of the motorcy-

cle gang, nor did he proffer the testimony of any person who would be able to give such testimony. Because Born failed to proffer any evidence concerning the motorcycle gang's operations that would even remotely support his argument that he was not involved in the cocaine transactions or his mistaken identity defense, we are convinced that the district court's ruling excluding evidence of the motorcycle gang on relevancy grounds was not a "clear abuse of discretion."

In connection with each of his relevancy contentions, we note that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a). As this court observed in *United States v. Green*,

> " 'Substantial right,' the language of harmless error, calls for an inquiry into whether the mistake 'had substantial and injurious affect or influence in determining the jury's verdict.' *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946). Unless the error creates a significant risk of convicting an innocent person, it should be disregarded. [citation omitted] No trial is perfect, and a direction to hold another is an invitation to further error and still further proceedings.
>
> We must compare the conduct of [a] trial not against the hypothetical perfect trial, but against a plausible future trial, beset with the sort of errors that infect almost all trials."

786 F.2d 247, 252-53 (7th Cir. 1986).

There was overwhelming evidence of Born's guilt including his personal presence and the presence of the maroon van (registered to Born) at the drug buys on May 13, 1987, and July 13, 1987. Furthermore, during the July 13, 1987, transaction, Born was observed carrying the pail (containing twelve pounds of cocaine) which was later discovered in Blessing's car. Also, after the arrests were made following the July 13, 1987, drug deal, three bags of cocaine and a telephone pager, an item commonly used

during drug transactions, were discovered in Born's van. It should be noted that Born was not only permitted to introduce evidence that others who frequented the ABC Lounge resembled him in physical and personal characteristics, but the district court also gave the mistaken identity jury instruction. Our review of the record convinces us that there was overwhelming evidence presented to the court of Born's guilt, and thus the exclusion of the evidence regarding motorcycle gang membership did not have a "substantial and injurious effect or influence in determining the jury's verdict." In short, on appeal we refuse to disturb the trial court's ruling excluding Born's testimony concerning motorcycle gang membership.

III. OTHER ACTS EVIDENCE

Next Born contends that the trial court erred in admitting the government's rebuttal testimony of Detective John Mueller concerning Born's discussion of possible cocaine purchases in February and April of 1986 and Born's apparent understanding of the use of the term "Z" of cocaine during these discussions.

In reviewing decisions to admit evidence, "we shall 'reverse the decision of the trial court only for abuse of discretion.' *United States v. Byrd*, 771 F.2d 215, 219 (7th Cir. 1985)." *United States v. Zapata*, 871 F.2d 616, 621 (7th Cir. 1989). The admissibility of "other acts" evidence is governed by Federal Rule of Evidence 404(b) which provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In this circuit, other acts evidence is admissible if it meets the requirements of a four-part test. Specifically, the district court must determine whether:

> "(1) The evidence is directed towards establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

United States v. Zapata, 871 F.2d 616, 620 (7th Cir. 1989).

Born argues that the court's decision to admit Detective Mueller's testimony was error because the government represented before trial that it would not introduce evidence of other acts in its case in chief and because Born did not place his intent in issue during his testimony. On the other hand, the government argues that the evidence was properly received for the purposes of demonstrating knowledge and intent.

Initially, we note that the government lived up to its agreement and did not introduce other acts evidence against Born in its case in chief. It was only after he denied any involvement in the charged drug conspiracy during his defense that the government presented Detective Mueller's testimony in its rebuttal case.

The government's use of other acts evidence on rebuttal in these circumstances is supported in this court's decision in *United States v. Chaimson*, 760 F.2d 798, 806 (7th Cir. 1985). In that case, the defendant, Samuel Chaimson, was charged with several counts of the specific intent crime of mail fraud. In his defense, Chaimson took the stand and denied any involvement or knowledge of the crimes charged. In its rebuttal case, the government introduced evidence of other acts. On appeal, Chaimson argued "that the Government's failure to introduce the 'other acts' evidence in its case in chief, coupled with the fact that the defense never challenged the intent element, preclude[d] the Government from introducing such evidence in its rebuttal case." *Id.* at 806. We disagreed, stating:

> "The intended effect of Chaimson's absolute and unequivocal denial was to negate completely the Government's proof, including the proof that Chaimson acted with intent to defraud. In view of Chaimson's blanket denial of any wrongdoing, and the fact that such a denial was meant to nullify any evidence of intent, it was certainly proper for the Government to overcome the defendant's absolute denial and reestablish the element of intent, in its rebuttal case, with the introduction of [other acts evidence]."

Id. at 806.

The first count of the indictment charged Born with conspiracy to distribute cocaine. "[C]onspiracy to distribute is a specific intent crime; the government shows that the defendant conspired to distribute with intent to distribute a controlled substance, in order to prove guilt." *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir.), *cert. denied*, ____ U.S. ____, 109 S. Ct. 2087 (1989). "In cases involving specific intent crimes, intent is automatically an issue, regardless of whether the defendant has made intent an issue in the case." *Monzon* at 344. Although Born conceded that he was at or near the locations where the cocaine sales occurred on at least two of the charged dates, he denied any involvement in the drug conspiracy or the distribution of cocaine on April 2, April 13, May 13 or July 13, 1987. Born's blanket denial of any wrongdoing, as in *Chaimson*, was meant to negate any evidence of intent. Therefore, it was proper for the court to allow the government, in its rebuttal, to overcome Born's absolute denial and reestablish the element of intent. Thus, we hold that Detective Mueller's testimony was directed toward establishing intent and satisfied the first part of the Zapata four-part test.[4]

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[4] Born contends that he did not place his intent in issue when he testified that he did not understand the meaning of "Z's" of cocaine, arguing that the prosecutor did not have a good faith basis for asking the initial question of whether the term was used in

(Footnote continued on following page)

Born further contends that the probative value of Detective Mueller's testimony was outweighed by the danger of unfair prejudice. We disagree for the evidence was probative of Born's knowledge and intent, and, further, the danger of unfair prejudice was minimized by the district court's instruction to the jury that the evidence should be considered only as to Born's intent and knowledge. "Because the defendant has presented no evidence to convince us otherwise, '[w]e make the crucial and valid assumption that the jurors carefully follow instructions given to them by the court.' " *United States v. Shukitis*, 877 F.2d 1322, 1329 (7th Cir. 1989) (quoting *United States v. Stern*, 858 F.2d 1241, 1250 (7th Cir. 1988)). Thus, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Accordingly, we hold that the trial court did not abuse its discretion in admitting evidence of Born's discussions with Detective Mueller.[5]

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[4] *continued*

a discussion between DeLisle and him. We need not address this contention since we have determined that Detective Mueller's testimony was admissible in the government's rebuttal case based on Born's blanket denial of wrongdoing and without any reference to the defendant's statements concerning the term "Z's" of cocaine.

[5] As to the third part of the other acts evidence test, concerning the strength of the other acts evidence, Born argued that Detective Mueller's testimony was not "clear and convincing" citing *United States v. Tuchow*, 768 F.2d 855, 862 (7th Cir. 1985). The government correctly pointed out that the Supreme Court recently lightened this burden in *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 1499 (1988). ("[S]uch evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.") In Born's reply brief, he makes no argument relating to this lower standard. Nevertheless, in reviewing the record, we are convinced that Detective Mueller's testimony was more than sufficient to support a jury verdict that Born took part in the conversation with the detective.

IV. MOTION FOR SEVERANCE

Mazzanti contends that the trial court improperly denied his motion for severance asserting that Born's defense prejudiced Mazzanti's ability to receive a fair trial. Specifically, Mazzanti argues that he was prejudiced when Born's counsel made certain remarks in his opening statement and when Born attempted to testify concerning a motorcycle gang. Born's counsel argued, in his opening statement, that a motorcycle gang was responsible for the drug transactions and that Mazzanti was a member of the gang. Born also sought to testify regarding the motorcycle gang, but the district court sustained the government's and Mazzanti's objections to this testimony.

In *United States v. Turk*, 870 F.2d 1304, 1306 (7th Cir. 1989), we recently summarized the law we apply to the review of a district court's severance decision when mutually antagonistic defenses are alleged:

> "Pursuant to Rule 14 of the Federal Rules of Criminal Procedure, a district court may grant severance if codefendants assert mutually antagonistic defenses. *United States v. Goudy*, 792 F.2d 664, 673 (7th Cir. 1986). Defenses are mutually antagonistic only where acceptance of one defendant's position precludes the acquittal of the other defendant. *United States v. Rollins*, 862 F.2d 1282, 1289 (7th Cir. 1988). There is a 'strong public interest in having persons jointly indicted tried together, especially where the evidence against the defendants arose out of the same acts or series of acts.' *United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984). We will, therefore, reverse a district court's decision on severance motion only upon a showing that the court abused its discretion, *Rollins*, 862 F.2d at 1289; *United States v. Bruun*, 809 F.2d 397, 407 (7th Cir. 1987), and limit review to the state of the record at the time the motion was made. *Rollins*, 862 F.2d at 1289."

Mere inconsistency alone is insufficient to find co-defendants' defenses mutually antagonistic. "Unless the de-

fenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of the other defendants, it is not necessary to hold separate trials." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.), *cert. denied*, 484 U.S. 815 (1987). However, even if defenses are not mutually antagonistic, "[s]everance can be granted if the actual conduct of one defendant's defense unduly prejudices his or her co-defendant." *United States v. Rollins*, 862 F.2d 1282, 1290 (7th Cir. 1988).

The initial issue is whether Mazzanti's and Born's defenses were mutually antagonistic. In *United States v. Gironda*, 758 F.2d 1201, 1220 (7th Cir.), *cert. denied*, 474 U.S. 1004 (1985), this court addressed the question of when defenses are mutually antagonistic. In *Gironda*, defendant Heckens moved for a mistrial or a severance on the ground that defendant Gironda's opening statement implied that Heckens was guilty. *Id.* at 1220. Gironda argued that he was innocent of any conspiracy that might have occurred. Heckens argued that the Government failed to prove its case against him. In affirming the district court's decision to deny severance, we noted, "the jury here could have accepted both Gironda's defense that he did not participate in the scheme and Heckens' defense that the Government failed to prove all of the elements of the crime of conspiracy." *Id.* at 1220.

The factual situation in this case is very similar to that in *Gironda*. Born argued that he was a victim of mistaken identity and that he had nothing to do with the drug deals. This defense did not preclude Mazzanti's similar defense that he also was not a participant. Further, no evidence was admitted concerning the motorcycle gang, and thus the jury could not properly have drawn inferences based upon such evidence. As in *Gironda*, Born's and Mazzanti's defenses were not mutually antagonistic.

The next issue is whether the actual conduct of Born's defense prejudiced Mazzanti. "This ground for severance . . . depends on a careful evaluation of the facts elicited,

prejudicial tendencies, and the entire course of the trial prior to the challenged conduct." *United States v. Zipperstein*, 601 F.2d 281, 286 (7th Cir.), *cert. denied*, 444 U.S. 1031 (1979). Moreover,

> "The defendant bears the burden of demonstrating undue prejudice resulting from the joint trial. To meet this burden, [Mazzanti] must establish that the joint trial was unfair, not merely that [he] would have had a better chance at acquittal if [he] had been tried separately. Finally, we cannot reverse the district court's denial of a severance motion based on a claim of undue prejudice absent an abuse of discretion."

Rollins, 862 F.2d at 1290 (citations omitted).

Although Born's counsel made reference to a motorcycle gang in his opening statement, the court gave the usual instruction that the arguments of counsel were not evidence and that the jury should decide the case based on the evidence introduced at trial. Furthermore, evidence of Mazzanti's alleged motorcycle gang membership was not admitted since the government's and Mazzanti's objections on the grounds of relevance were sustained; therefore, the jury could not properly have drawn any inferences. Therefore, Mazzanti has failed to demonstrate that he suffered such undue prejudice as to render the joint trial unfair. Thus, we hold that the district court properly exercised its discretion in denying Mazzanti's motion for severance on the grounds of either mutually antagonistic defenses or undue prejudice.

V. MULTIPLE CONSPIRACY INSTRUCTION

Mazzanti and Born both contend that the district court committed reversible error in refusing to give a proposed jury instruction offering the jury the option of finding a number of smaller conspiracies as an alternative to finding a single conspiracy. Mazzanti and Born argue that the evidence presented at trial "showed the possibility of two conspiracies." They contend that one conspiracy "may

have consisted of DeLisle, Born, and Mazzanti" and a second conspiracy consisted of Taglia and two other persons charged in the indictment. Mazzanti and Born assert that the DeLisle conspiracy may have been responsible for the drug sales of April 2, April 13 and May 13 while the Taglia conspiracy may have been responsible for drug deals on April 21, May 21 and July 13. The April 21 and May 21 drug buys were in the indictment, but only persons other than Mazzanti and Born were charged with these events.

In our review of the trial judge's refusal to give the multiple conspiracy instruction we recognize that a "trial court does not err in refusing to give a multiple conspiracy instruction if the evidence does not warrant such an instruction." *United States v. Towers*, 775 F.2d 184, 189 (7th Cir. 1985). As this court stated in *Towers*, 775 F.2d at 189:

> "A reviewing court determining whether the evidence established a single conspiracy or multiple conspiracies must consider the evidence in the light most favorable to the government. *United States v. Read*, 658 F.2d 1225, 1230 (7th Cir. 1981). To determine whether a single or multiple conspiracy existed, the court must look to the nature of the agreement. *United States v. Kendall*, 665 F.2d 126, 136 (7th Cir. 1981). 'If the persons joined together to further one common design or purpose, a single conspiracy exists.' *Id.*"

"As long as a common goal is being furthered, a person 'can be part of a common enterprise without being indispensable to that enterprise; and a common enterprise for illegal ends is a conspiracy whose inessential as well as essential members are conspirators.' " *United States v. Whaley*, 830 F.2d 1469, 1475 (7th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1738 (1988) (quoting *United States v. Cerro*, 775 F.2d 908, 914 (7th Cir. 1985)).

The evidence at trial established that on July 13, 1987, Mazzanti and Born, as well as DeLisle and Taglia, were

actively involved in the sale of twelve pounds of cocaine. On that day, Blessing, the informant, and undercover DEA agents Riley and Maloney met with Taglia and were joined by Mazzanti and DeLisle. During a meeting DEA Agent Riley inquired whether the quality of the cocaine was going to be good, and Mazzanti responded that Agent Riley would be very happy. At one point Mazzanti got up to make a phone call and when he hung up the phone, DEA Agent Maloney queried when the deal would be completed. Mazzanti responded, "I'm trying to get a hold of my guy Paul." Shortly after this conversation, Paul Born arrived in his maroon van and exited the same van carrying a white pail containing the cocaine. Later, Mazzanti was observed placing the white pail containing cocaine in the trunk of Blessing's car.

The July 13, 1987, transaction demonstrates that Born and Mazzanti shared the common goal of selling cocaine for profit with the other co-conspirators. The July 13, 1987, transaction was overwhelming evidence of a conspiracy with a single goal. Further, Mazzanti and Born's activities concerning the April 2, April 13 and May 13, 1987, drug deals demonstrate that the defendants were in contact with DeLisle and Taglia and were actively involved in the sale of cocaine on these dates. Also, after both the April 2 and May 13 cocaine buys, Taglia, in conversations with Blessing, commented that he was aware of these cocaine buys. Last, DeLisle was present at each of the drug transactions in which Born and Mazzanti were charged. Thus, viewing this evidence in the light most favorable to the government, we agree with the district court that Mazzanti and Born's activities established one single ongoing conspiracy rather than multiple conspiracies.

As for the April 21 and May 21 drug deals, the only evidence introduced at trial occurred when Mazzanti's counselor attempted to cross-examine informant Blessing concerning these cocaine transactions. The counselor inquired whether Taglia and two other persons were the only ones involved in those transactions. Mazzanti's counsel was the only one who sought inquiry into the

area, and Mazzanti and Born were not charged with these April 21 and May 21 offenses. Thus, we hold that the evidence did not warrant a multiple conspiracy instruction, and the trial court's rejection of the proferred instruction was proper.

V. CONCLUSION

The defendants' arguments in favor of reversing their convictions are without merit. The district court properly excluded Born's evidence concerning motorcycle gang membership as he did not present sufficient factual foundation for the district court to find the evidence concerning a motorcycle gang to be relevant. Further, the trial court properly admitted evidence of Born's knowledge of cocaine transactions. The evidence was admissible under Fed. R. Evid. 404(b) and met the requirements of the four-part test as stated in *Zapata*, 871 F.2d at 624.

Mazzanti has failed to demonstrate prejudice resulting from his joint trial with Born. No evidence was admitted concerning Mazzanti's alleged membership in the motorcycle gang. Thus, the district court properly exercised its discretion in rejecting Mazzanti's severance motion. Furthermore, the district court properly instructed the jury as to a single conspiracy. The evidence at trial supported the district court's finding that a multiple conspiracy instruction was not warranted. Therefore, the convictions of Mazzanti and Born are

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 11, 1989.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 88-2361 v.

PAUL BORN III,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 87 CR 518
James F. Holderman, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellant, all of the judges on the original panel having voted to deny the same,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 89-1321

Supreme Court, U.S.
FILED
APR 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

PAUL BORN, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certain evidence, which directly contradicted petitioner's testimony, was properly admitted on rebuttal.

2. Whether a question by the prosecutor to petitioner on cross-examination amounted to harmless error.

3. Whether certain testimony by petitioner concerning his non-membership in a motorcycle gang was properly excluded.

4. Whether the government improperly declined to restrict its cross-examination of a defense witness or to grant that witness immunity when the witness refused to testify at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 888 F.2d 1165.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1989. A petition for rehearing was denied on December 11, 1989. Pet. App. 18. The petition for a writ of certiorari was filed on February 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was also convicted on four counts of distributing cocaine and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 23 years' imprisonment on each count, to be followed by ten years of supervised release. Pet. App. 3-4, 5.

1. The evidence at trial showed that petitioner was involved in supplying cocaine for a number of cocaine sales made to a government informant, Robert Blessing, and an undercover DEA agent, John Riley. Blessing first arranged two cocaine purchases from Oscar DeLisle on April 2 and April 13, 1987, at the ABC Lounge in Streamwood, Illinois. At the first sale, Blessing and Agent Riley met with petitioner, DeLisle, co-defendant Donald Mazzanti, and Daniel Taglia. After some discussion, petitioner and Mazzanti left the bar; they returned shortly thereafter and spoke to DeLisle. DeLisle then gave two ounces of cocaine to Blessing and Agent Riley. Pet. App. 2.

On April 13th, Blessing and Agent Riley met petitioner, DeLisle, and Mazzanti in the ABC Lounge parking lot. DeLisle stated that the cocaine had to be picked up in Elgin, Illinois. Petitioner and Mazzanti then drove off in an orange van and DeLisle left. When the van returned, Blessing and Agent Riley got into the van and found petitioner and DeLisle inside. DeLisle took a clear plastic bag filled with approximately two ounces of cocaine from a shopping bag filled with similar bags and gave it to Agent Riley, who paid him $3200. Pet. App. 2; Gov't C.A. Br. 5-6.

Blessing arranged a third cocaine sale for May 13, 1987. That afternoon, Blessing and Agent Riley met DeLisle and Mazzanti at DeLisle's house. After some delay, DeLisle said that the cocaine had arrived, and he then left the house. A DEA surveillance agent observed DeLisle enter the ABC

Lounge at about the same time that petitioner pulled into the parking lot in his maroon van. After petitioner entered the lounge, DeLisle came out and walked over to petitioner's van, from which he removed a dark-colored package. DeLisle then returned to his house, where he sold Agent Riley two ounces of cocaine. Pet. App. 2-3; Gov't C.A. Br. 7-8.

Over the next two months, Blessing and Agent Riley made arrangements with Taglia and James Westerman for a multi-kilogram cocaine transaction. On July 7, 1987, after the transaction had been delayed several times, Taglia explained to Blessing and Agent Riley that he was having trouble reaching his source, who was going to be appearing in court. Both petitioner and Mazzanti appeared in state court that morning. Gov't C.A. Br. 8-9. Finally, Taglia agreed to supply a quantity of cocaine worth $175,000 at a price of $32,000 per kilogram on July 13, 1987. On that day, Blessing, Agent Riley and a second undercover DEA agent, Bill Maloney, drove with Taglia to a pizzeria in Streamwood, where they met Mazzanti and DeLisle. Pet. App. 3. While they waited, someone commented that the cocaine would be coming in a white plastic paint pail. Gov't C.A. Br. 10. At one point, Mazzanti made a phone call, explaining that he was trying to reach "my guy Paul." Pet. App. 3.

Shortly thereafter, petitioner drove his maroon van into the parking lot. At Mazzanti's request, Blessing gave Mazzanti his car keys, and Mazzanti left the restaurant. In the parking lot, petitioner removed a large white plastic pail from his van; Mazzanti then transferred the pail into the trunk of Blessing's car. After Mazzanti returned to the restaurant, Blessing went to the car, tasted the cocaine, and told the agents that the cocaine was suitable. DEA agents then arrested DeLisle, Mazzanti, and petitioner. Pet. App. 3; Gov't C.A. Br. 12. Inside petitioner's van, the agents found three bags of cocaine, a .357 magnum pistol, and

a telephone paging device. The white plastic pail in the trunk of Blessing's car contained approximately 12 pounds of cocaine. *Ibid.*

2. Petitioner's defense was that the government witnesses mistook him for either John Burroughs or John Newell, two men who resembled him and who frequented the ABC Lounge. Pet. App. 4; Pet. 6-7. In his testimony at trial, petitioner admitted that he was at or near the locations of two of the cocaine transactions, but he denied being involved in any of the sales. Petitioner also admitted that he was a frequent patron of the ABC Lounge, but he testified that he knew nothing about the cocaine sales there. Petitioner acknowledged that he owned a maroon van, but he explained that DeLisle and Mazzanti sometimes worked for him and kept their work tools in his van. Pet. App. 4. Petitioner sought to testify that Mazzanti, Burroughs, and Newell were members of the Brothers motorcycle gang and that he was not a member of that gang. He offered that testimony to support his theory that the cocaine transactions were carried out by members of that gang. The district court, however, excluded that testimony as irrelevant. *Ibid.*

On cross-examination, the government asked petitioner whether he had discussed the cocaine purchases with DeLisle and whether he had used the term "two Z's" of cocaine in a discussion with DeLisle. Petitioner denied having any discussion or making any statement regarding "two Z's," and he denied any knowledge of that term. Pet. App. 4.

In rebuttal, the government called Detective John Mueller, a state police officer who testified that he had discussed cocaine transactions with petitioner. Mueller added that he had used the term "Z's" in their conversation to refer to ounces of cocaine and that petitioner appeared to understand the meaning of the term. Pet. App. 4.

3. The court of appeals affirmed. Pet. App. 1-17. It held that the district court did not abuse its discretion by refusing to allow petitioner to introduce evidence concerning

motorcycle gang membership. Pet. App. 5-8. The court rejected petitioner's contention that the testimony was relevant to his defense because a motorcycle gang would not be likely to allow a non-member like himself to participate in its drug deals. The court agreed with the district court that petitioner "was not competent to testify to the machinations of the gang as he lacked personal knowledge of these matters since he was not a member of the group." Pet. App. 6. The court added that petitioner had failed to offer the testimony of any motorcycle gang members concerning the operation of the gang or to proffer any evidence concerning the motorcycle gang's drug-selling practices that would support his defense. *Ibid.*

For the same reasons, the court rejected petitioner's argument that the excluded testimony was relevant to his mistaken identity defense. Pet. App. 6-7. The court noted that petitioner "was allowed to introduce evidence on this defense" and "was prevented only from bolstering this [defense] with other extraneous evidence concerning the motorcycle gang." Pet. App. 6.

The court held that any error in the exclusion of the testimony about motorcycle gang membership was harmless in any event, since "[t]here was overwhelming evidence of [petitioner's] guilt"; petitioner "was * * * permitted to introduce evidence that others who frequented the ABC Lounge resembled him in physical and personal characteristics"; and the district court instructed the jury on the issue of mistaken identity. Pet. App. 7, 8.

The court of appeals next held that the district court did not abuse its discretion when it admitted the rebuttal testimony of Detective Mueller. Pet. App. 8-11. The court noted first that the government had kept its agreement not to introduce other acts evidence against petitioner in its case-in-chief. Pet. App. 9. As the court explained, "[i]t was only after [petitioner] denied any involvement in the charged drug

conspiracy during his defense that the government presented Detective Mueller's testimony in its rebuttal case." *Ibid.*

Relying on *United States* v. *Chaimson*, 760 F.2d 798 (7th Cir. 1985), the court ruled that Mueller's testimony was properly admitted under Fed. R. Evid. 404(b) to show intent. Pet. App. 9-10. The court held that the "blanket denial of any wrongdoing" issued by petitioner when he took the stand "was meant to negate any evidence of intent." Pet. App. 10. The government in its rebuttal could therefore properly seek "to overcome [petitioner's] absolute denial and reestablish the element of intent." *Ibid.*[1]

Finally, the court concluded that the probative value of Detective Mueller's testimony on the issue of petitioner's knowledge and intent outweighed any danger of unfair prejudice, minimized as it was by the district court's instruction to the jury "that the evidence should be considered only as to [petitioner's] intent and knowledge." Pet. App. 11.

ARGUMENT

1. Petitioner claims (Pet. 9-22) that Detective Mueller's testimony was improperly admitted for several reasons.

a. Petitioner first argues (Pet. 9-12) that the court of appeals' approach in determining the admissibility of Mueller's testimony on rebuttal conflicts with that taken by the Second Circuit. The Seventh Circuit allows the government to introduce evidence under Rule 404(b) to prove intent when specific intent is an element of the charged offense. Pet. App. 9-10; *United States* v. *Chaimson*, 760 F.2d

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[1] Since it concluded that Mueller's testimony was admissible to counter petitioner's blanket denial of wrongdoing, the court saw no need to address petitioner's argument that he had not placed his intent in issue when he denied knowing the meaning of the term "Z's" of cocaine and that the prosecutor had asked about the term without a good faith basis. Pet. App. 10 n.4.

798, 805-806 (1985); see generally 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[09], at 404-64 to 404-66 (1989). The Second Circuit, on the other hand, has adopted a rule that the government may not introduce evidence under Fed. R. Evid. 404(b) to prove intent if a defendant does not directly contest that element of the offense. *United States* v. *Colon*, 880 F.2d 650 (1989); *United States* v. *Ortiz*, 857 F.2d 900 (1988), cert. denied, 109 S. Ct. 1352 (1989). In the Second Circuit's view, the claim that a defendant had no involvement in the acts constituting the offense—as opposed to a claim that he did the acts innocently or mistakenly—does not raise a dispute as to the issue of intent. *Colon*, 880 F.2d at 656-657; *Ortiz*, 857 F.2d at 903-904.

While there is a difference in the approaches of the Seventh and Second Circuits, that difference is not implicated by this case. The Second Circuit has explained that, in order to remove the issue of intent from a case, a defendant must (1) unequivocally express a decision not to dispute the issue of intent, and (2) agree to accept an instruction to the jury that, if it finds the other elements of the offense established beyond a reasonable doubt, it can resolve the issue of intent against the defendant because intent is not disputed. *Colon*, 880 F.2d at 659; *Ortiz*, 857 F.2d at 903-904. While the Second Circuit does not require a formal stipulation to satisfy the first requirement, "a defendant must make some statement to the [trial] court of sufficient clarity to indicate that the issue [of intent] will not be disputed." *Colon*, 880 F.2d at 659. Even if petitioner's theory of defense was sufficient to put the district court on notice that he did not dispute the issue of intent, there is no indication that petitioner was willing to accept the required instruction that the jury should find the necessary specific intent if it found the other elements of the offense. To the contrary, after denying any involvement in the cocaine transactions, petitioner specifically denied that he had any in-

tent of involvement. 4/28 Tr. 1496, 1502. Under these circumstances, the Second Circuit would not have reached a different result in this case. *Colon*, 880 F.2d at 659.

In addition, petitioner's claim that the Second Circuit would not have admitted Mueller's testimony under Rule 404(b) overlooks the fact that Mueller's testimony was properly admissible for a purpose wholly independent of proving petitioner's intent and knowledge: to impeach his credibility through specific contradiction. Petitioner testified both on direct and on cross-examination that he knew nothing about any cocaine; on cross-examination, he further testified that he did not know the meaning of the term "Z's" of cocaine. 4/28 Tr. 1453, 1496-1499, 1502. Mueller's testimony directly contradicted petitioner's testimony. It was therefore properly admissible to impeach petitioner's credibility, regardless whether it was also separately admissible under Rule 404(b). See *United States* v. *Abel*, 469 U.S. 45, 56 (1984); 3 D. Louisell & C. Mueller, *Federal Evidence* § 343, at 498-499 & n.85 (1979); see, *e.g.*, *United States* v. *Warren*, 453 F.2d 738, 742 (2d Cir. 1971), cert. denied, 406 U.S. 944 (1972); *Schoepflin* v. *United States*, 391 F.2d 390, 396 (9th Cir.), cert. denied, 393 U.S. 865 (1968).[2]

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[2] Petitioner also renews his contention (Pet. 12-16) that Mueller's testimony should not have been admitted because the government represented before trial that it would not introduce any evidence of other bad acts by petitioner under Rule 404(b) during its case-in-chief. As the court of appeals explained, however, the government "lived up to its agreement" because it did not introduce any evidence under Rule 404(b) during its case-in-chief. Detective Mueller's testimony was introduced in rebuttal only after petitioner denied on direct examination any involvement in the cocaine transactions. Pet. App. 9. As the court of appeals noted (Pet. App. 10), the use of Mueller's testimony was proper at that point because the government needed to "reestablish the element of intent." *Ibid.* See, *e.g.*, *United States* v. *Chaimson*, 760 F.2d 798, 806 (7th Cir. 1985).

b. Petitioner also protests (Pet. 17-19) that, in concluding that the probative value of that testimony was not outweighed by the danger of unfair prejudice, the court of appeals improperly assumed that the jurors followed the instruction to consider Detective Mueller's testimony only as to petitioner's intent and knowledge. That contention is meritless; this Court has repeatedly reaffirmed the "crucial" and "almost invariable" assumption that jurors carefully follow their instructions. See, *e.g.*, *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987); *Francis* v. *Franklin*, 471 U.S. 307, 325 n.9 (1985); *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967).[3]

2. Petitioner contends (Pet. 19-22) that the prosecutor improperly asked him on cross-examination whether he had used the term "two Z's" of cocaine in a conversation with DeLisle on May 13, 1987, when there was no evidence to show that such a conversation occurred.

Since the district court did not require development of the record on this point, the record does not reflect the basis for the prosecutor's question. Even assuming that the prosecutor's question was erroneous, however, the error was clearly harmless. As the court of appeals pointed out (Pet. App. 11 n.4), the question was not the basis for the admission of Mueller's testimony in rebuttal; that testimony was admitted based on petitioner's blanket denial of wrongdoing. Nor, evaluating the asserted error within the context of the whole record, did it have any notable significance: the prosecution merely asked whether a conversation had taken place and was given a negative answer. The impact

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[3] Petitioner also complains (Pet. 19) that the prosecutor "misused" Mueller's evidence by stating to the jury that Mueller's testimony showed petitioner to be a liar. But because Mueller's testimony was admitted to impeach the credibility of petitioner's denials of knowledge of the cocaine transactions, it was entirely proper for the prosecution to argue that the evidence showed that petitioner was lying when he denied having any knowledge of cocaine sales at the ABC Lounge.

of the question about the term "Z's" pales in comparison to what the court of appeals identified as the "overwhelming evidence" of petitioner's guilt. Pet. App. 7, 8. Government agents met with petitioner at two cocaine sales, and they observed him acting as the supplier of the cocaine on those and two subsequent occasions, the last of which involved 12 pounds of cocaine. When petitioner was arrested, he had three bags of cocaine in his van. Under these circumstances, the jury could not have attached much weight to the question whether petitioner knew the meaning of the term "Z's."

3. Petitioner renews his contention (Pet. 24-33) that the district court abused its discretion by refusing to allow him to testify that other participants in the drug sale were members of a motorcycle gang while he was not. Under petitioner's theory, his excluded testimony was relevant because his non-membership in the motorcycle gang made it less likely that he was involved in a drug conspiracy in which the other participants were gang members.

That conclusion follows, however, only if there was some evidence to show that the motorcycle gang would not be likely to include a non-member in their drug transactions. As the court of appeals pointed out (Pet. App. 6), however, petitioner was not competent to give that testimony because, as a self-proclaimed non-member, he lacked personal knowledge about the internal functioning of the gang. See Fed. R. Evid. 602. Nor did petitioner proffer any other evidence regarding the motorcycle gang's drug-selling practices to support his hypothesis. Thus, petitioner's testimony about his non-membership in the motorcycle gang would have been relevant only if the jury had engaged in speculation that the gang would not include a non-member in a drug deal; as such, it was properly excluded at trial.

In any event, the court of appeals correctly concluded that any error in the exclusion of petitioner's testimony was

harmless. Contrary to petitioner's suggestions (Pet. 25-26), he was allowed to introduce evidence and argue that Burroughs and Newell, the two gang members who resembled him and frequented the ABC Lounge, were the likely offenders to support his mistaken identity defense. Pet. App. 6, 8; 4/28 Tr. 1447-1448; 4/29 Tr. 1688, 1692. Moreover, the district court gave the jury a mistaken identity instruction. Pet. App. 8. Finally, there was "overwhelming evidence" of petitioner's guilt, including his presence and the use of his van at the drug buys on May 13, 1987 and July 13, 1987. Pet. App. 7, 8. Petitioner's fact-bound claim does not warrant further review.

4. Finally, petitioner contends (Pet. 33-39) that he was prejudiced because he was unable to call Daniel Taglia, who had pleaded guilty in the case and was awaiting sentencing, as a defense witness. Petitioner asserts that Taglia invoked his Fifth Amendment privilege against compulsory self-incrimination after the prosecutor refused to restrict his cross-examination of Taglia to "nonincriminating areas" and declined to offer Taglia immunity.

Petitioner cites no authority for the proposition that a prosecutor should agree to handicap his exploration of a witness's statements or credibility on cross-examination, or that the trial process will be aided by such a limitation. Nor is petitioner on firmer ground in claiming that Taglia should have been compelled to testify or that the government should have granted Taglia immunity. "[T]he Sixth Amendment right of an accused to compulsory process to secure the attendance of a witness does not include the right to compel the witness to waive his Fifth Amendment privilege. Nor is an accused entitled to compel a prosecutor to grant immunity to a potential defense witness to get him to testify." *United States* v. *Paris*, 827 F.2d 395, 399 (9th Cir. 1987) (internal quotation marks omitted); see also *Diggs* v. *Owens*, 833 F.2d 439, 444 (3d Cir. 1987), cert. denied, 485 U.S. 979 (1988);

United States v. *Thornton*, 733 F.2d 121, 125 (D.C. Cir. 1984). It is widely agreed that the decision to grant immunity is a responsibility only of the Executive Branch. See, *e.g.*, *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983); *United States* v. *Pennell*, 737 F.2d 521, 526-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Turkish*, 623 F.2d 769, 771-777 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). Petitioner failed to make any showing that Taglia had evidence that would have exculpated petitioner if Taglia had been compelled to testify; at most, Taglia's testimony would have tended to minimize his own involvement in the conspiracy even though he had already pleaded guilty. See Pet. 34-35. There is therefore no basis for any claim that the prosecutor's failure to grant immunity for Taglia denied petitioner a fair trial. Compare *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S REPLY BRIEF

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May it please the Court:

The Brief for the United States contains two very serious misstatements. One is a misrepresentation of the record; the other is a flagrantly erroneous interpretation of relevant lower court opinions.

Each of those misleading statements is a grave departure from objectivity. Taken in tandem, they have the potential for frustration of the judicial process in this case. That possibility is enlarged by the presumptive reliability normally attributed to the statements of government counsel.

A Reply Brief is not an appropriate vehicle for argument of all issues. We limit this Brief to consideration of the Government's misguiding statements, and treat each of them in turn.

I. The Misstatement of Law: The Supposed Need for a Stipulation

The opinion below and the law of the Second Circuit are in clear conflict. The opinion below reflects the Seventh Circuit view that intent is in issue in every case of this type, justifying "other acts" evidence in all such cases. The Second Circuit, on the other hand, holds that intent is not placed in issue by a denial that the defendant performed the act charged to him. The relevant cases were cited at page 11 of our Petition.

The Government argues that the inter-Circuit conflict is not involved in this case because Petitioner did not tender a stipulation that the issue of intent would not be disputed (Govt. Br. at 7.)

It is true that such a stipulation was tendered in United States v. Colon, 880 F. 2d 650, 658-60 (2 Cir 1989), the

case which contains the definitive expression of the Second Circuit position. Such a stipulation, however, is useful only for the purpose of forestalling the introduction of "other acts" evidence as a part of the prosecution's case in chief. It has no relevance whatever to the admissibility of such evidence during rebuttal.

If, in advance of trial, the prosecution indicates an intention to introduce "other acts" evidence, the defendant may tender a stipulation to remove intent from the case. That stipulation, however, would affect only the prosecution case in chief. An order excluding "other acts" evidence, based on that stipulation, would not prohibit the prosecution from rebutting any express denials which a defendant might volunteer while presenting his own case.

Such a stipulation, however, serves no purpose where, as here the prosecution states in advance of trial that it will not use "other acts" evidence during its case in chief. By making that statement, the government offered everything that a stipulation could accomplish: The only purpose of such a stipulation is to prevent the introduction of such evidence during the prosecution case in chief.

Once the defense case has been presented, the admissibility of such evidence on rebuttal is determined by the content of the defense evidence, and the pretrial stipulation becomes irrelevant.

That proposition is obvious, both as a matter of logic and as a rule of law. Colon states that intent can be removed from a case "either by putting forward a particular theory of defense or by specifically offering to stipulate." 880

F. 2d at 657, emphasis added. If the defendant commits himself firmly to a theory, or (with even more conclusive effect) completes the presentation of his evidence, every possible purpose of a stipulation has been satisfied completely.

In the Second Circuit, as everywhere else, a defense stipulation simply serves no purpose when the government states that "other acts" evidence will not be used during its case in chief. After the government's case has been heard, it is the defense evidence and not a pretrial stipulation which determines the admissibility of "other acts" or any other form of rebuttal evidence.

That obvious proposition is confirmed by the Colon opinion, upon which both Petitioner and the Government rely. It is difficult to imagine how the Government could have interpreted Colon otherwise.

As previously quoted at page 4 of this Reply, Colon unequivocally holds that a clear statement of the defense theory is the equivalent of a tender of stipulation.

Colon is based largely upon United States v. Ortiz, 857 F. 2d 900 (2 Cir 1988), which did not involve a pretrial stipulation. The Ortiz court stated:

> "Moreover, intent is not placed in issue by a defense that the defendant did not do the charged act at all. [Citations] When a defendant unequivocally relies on such a defense, evidence of other acts is not admissible for the purpose of proving intent." 857 F. 2d at 904.

A stipulation serves no purpose other than as an advance indication of a defendant's theory. Once the defendant has offered his evidence, it is neither necessary nor rational to rely on any other indication of his theory.

In the case before Your Honors, the "other acts" evidence was introduced after

the Petitioner had presented his evidence, and had made it clear that the defense was simply a denial that he had performed the acts charged against him. To contend, as the Government does, that Petitioner should be denied relief because he did not offer to stipulate that his evidence had been that which the trial court had heard, barely rises to the dignity of absurdity.

II. The Misstatement of Fact: Denial of Knowledge of Cocaine

The Government also seeks to avoid the inter-Circuit conflict by stating that the difference between the Second Circuit and Seventh Circuit rules is irrelevant. The argument is made that, regardless of the intent issue, the "other acts" evidence was admissible for the purpose of impeaching Petitioner's supposed testimony that he knew nothing about cocaine (Govt Br. at 8.)

But there was no such testimony. The page references offered by the Government do not support its assertions. Petitioner stated only than that at the time of his arrest he had told the arresting officers that he knew nothing about the cocaine which had been found at the scene of the arrest (Tr. 1453.)

Far from denying all knowledge of cocaine, he admitted knowing that the term "OZ" was used by involved persons to refer to an ounce of cocaine (Tr. 1529).

The "other acts" testimony was not offered nor received as rebuttal of any such statement as that wrongly attributed to him by the Government Brief. It was received, and its reception was justified below, only because Petitioner had "denied any involvement in the charged drug conspiracy" (App. 9, 10). That theory of admissibility was grounded on the Seventh

Circuit view that "in cases involving specific intent crimes, intent is automatically in issue," (App. 10.)

If, as the Government now suggests, Born had denied all knowledge of cocaine, the Mueller testimony would have been offered, received and upheld at trial and on appeal without necessity for resort to the complex rationale expressed by the Court of Appeals (App. 8-10).

The conflict between the Second and Seventh Circuits is presented squarely by this case. That conflict addresses the essence of the Sixth Amendment guarantee of trial on a specific accusation. It cries for this Court's authoritative resolution.

Respectfully submitted,

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